

**In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Order Denying Complainant's Request for Reconsideration of Remand Order.
Filed November 27, 2001.**

Reconsideration of remand order – Decision defined – Slow-pay – No-pay.

The Judicial Officer denied Complainant's request for reconsideration of *In re Kirby Produce Co.*, 60 Agric. Dec. ____ (Aug. 27, 2001) (Remand Order). The Judicial Officer rejected Complainant's contention that the Court in *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001), remanded *Kirby* with a mandate that the United States Department of Agriculture adopt a new "slow-pay"/"no-pay" policy for the *Kirby* proceeding. The Judicial Officer concluded the Court in *Kirby Produce Co. v. United States Dep't of Agric.* remanded the proceeding to the United States Department of Agriculture to determine whether the case is a "no-pay" or a "slow-pay" case using the United States Department of Agriculture's "slow-pay"/"no-pay" policy adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984).

Eric Paul, for Complainant.

Paul T. Gentile, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151).

Complainant alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On November 12, 1997, Respondent filed an "Answer," and on December 4, 1997, Respondent filed an "Amended Answer" denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ]¹ scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full

¹The Secretary of Agriculture appointed James W. Hunt Chief Administrative Law Judge on November 7, 1999.

payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4). On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (2) finding that, as of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Co.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999). On August 27, 2001, I remanded the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time of the hearing. *In re Kirby Produce Co.*, 60 Agric. Dec. ____ (Aug. 27, 2001) (Remand Order).

On October 5, 2001, Complainant filed a "Request for Reconsideration of Remand Order" pursuant to section 1.172 of the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act (7 C.F.R. § 1.172). On October 9, 2001, Complainant filed "Correction of Initial Page of Request for Reconsideration of Remand Order" stating Complainant erroneously submitted Complainant's Request for Reconsideration of Remand Order pursuant to the Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act, which are not applicable to this proceeding, and

Complainant should have filed Complainant's Request for Reconsideration of Remand Order pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146). On November 19, 2001, Respondent filed "Opposition to Request for Reconsideration of Remand Order."² On November 20, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Request for Reconsideration of Remand Order, as amended by Complainant's Correction of Initial Page of Request for Reconsideration of Remand Order [hereinafter Request for Reconsideration of Remand Order].

As an initial matter, I find Complainant's Request for Reconsideration of Remand Order cannot be considered pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party to a proceeding under the Rules of Practice may file a petition for reconsideration of the decision of the Judicial Officer. Section 1.132 of the Rules of Practice defines the word "decision" as follows:

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

In re Kirby Produce Co., 60 Agric. Dec. ____ (Aug. 27, 2001) (Remand Order),

²Respondent's response to Complainant's Request for Reconsideration of Remand Order was required to be filed no later than November 19, 2001 (Informal Order dated October 30, 2001). The Hearing Clerk stamped Respondent's Opposition to Request for Reconsideration of Remand Order with a time and date stamp indicating that Respondent filed Respondent's Opposition to Request for Reconsideration of Remand Order on November 20, 2001. However, Ms. Lawuan Waring, a legal technician employed by the Office of the Hearing Clerk, informed the Office of the Judicial Officer that Respondent's Opposition to Request for Reconsideration of Remand Order reached the Hearing Clerk on November 19, 2001. Therefore, I conclude Respondent's Opposition to Request for Reconsideration of Remand Order was timely filed on November 19, 2001. See 7 C.F.R. § 1.147(g).

is not a decision and order by the Judicial Officer upon appeal of an administrative law judge's decision. Therefore, the August 27, 2001, Remand Order is not a *decision* as defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132), and section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party may file a petition for reconsideration of the Judicial Officer's *decision*, is not the proper section of the Rules of Practice under which to request reconsideration of the August 27, 2001, Remand Order. However, I find that Complainant may request reconsideration of the August 27, 2001, Remand Order pursuant to section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that any motion will be entertained other than a motion to dismiss on the pleading. Therefore, I treat Complainant's Request for Reconsideration of Remand Order as a request made pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143).

Complainant requests that I modify the August 27, 2001, Remand Order to require the Chief ALJ to determine whether Respondent was in full compliance with the PACA on January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. Complainant contends the August 27, 2001, Remand Order, in which I remanded the proceeding to the Chief ALJ to determine whether Respondent is in compliance with the PACA at the time the hearing in this proceeding actually commences, does not comply with the mandate in *Kirby Produce Co. v. United States Dep't of Agric.* (Request for Recons. of Remand Order at 2-4.) Respondent states the August 27, 2001, Remand Order is in accordance with the United States Department of Agriculture's "slow-pay"/"no-pay" policy and nothing in *Kirby Produce Co. v. United States Dep't of Agric.* indicates the United States Court of Appeals for the District of Columbia Circuit intended to modify or reverse the United States Department of Agriculture's "slow-pay"/"no-pay" policy (Opposition to Request for Recons. of Remand Order at second unnumbered page).

I agree with Complainant that there is language in *Kirby Produce Co. v. United States Dep't of Agric.* indicating that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that under the United States Department of Agriculture's policy, which was in effect at the time, payment by the date set for a hearing would convert a "no-pay" case into a "slow-pay" case and would result in license suspension rather than license revocation, as follows:

Although the Secretary is statutorily authorized to revoke a license for flagrant violations, Department of Agriculture policy during the relevant time period permitted a licensee to avoid revocation by making full payment prior to the date set for a hearing on the violations. Such payment would

convert a “no-pay” case into a “slow-pay” case, and would result in license suspension rather than revocation. See *In re Kirby Produce Co.*, 58 Agric. Dec. 1011 (1999) (citing *In re Gilardi Truck & Transp.*, 43 Agric. Dec. 118 (1984)).

Kirby Produce Co. v. United States Dep’t of Agric., 256 F.3d at 831 (footnote omitted).

However, the Judicial Officer’s former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to suspend (rather than revoke) the license of a PACA licensee who made full payment and was in full compliance with the PACA *by the date of the hearing*. The cases cited by the Court establish that the United States Department of Agriculture’s policy was that full payment, together with full compliance with the PACA *by the date of the hearing*, would convert a “no-pay” case into a “slow-pay” case and would result in license suspension rather than license revocation.³ Moreover, Complainant cites no case in which the United States Department of Agriculture’s policy was that full payment by the date set for a hearing (rather than the date of the hearing) would convert a “no-pay” case into a “slow-pay” case.

I do not read *Kirby Produce Co. v. United States Dep’t of Agric.* as requiring the United States Department of Agriculture to adopt a new “slow-pay”/“no-pay” policy for this proceeding. Instead, I find the Court remanded the proceeding for the United States Department of Agriculture to determine whether this is a “no-pay” case or a “slow-pay” case using the United States Department of Agriculture’s “slow-pay”/“no-pay” policy set out in *In re Gilardi Truck & Transp., Inc.*, as modified by *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987).

Complainant also contends the August 27, 2001, Remand Order would improperly allow payments made 6 and 7 years late to constitute slow payment, warranting license suspension. Complainant suggests that full payment made 6 or 7 years late constitutes “glacial” payment, warranting license revocation. Further, Complainant states it was never contemplated by the Judicial Officer in *In re Gilardi Truck & Transp., Inc.*, that a “no-pay” case could be converted into a “slow-pay” case by making full payment 6 to 7 years after a respondent violates the PACA and the Regulations by failing to make full payment promptly. (Request for

³ See *In re Kirby Produce Co.*, 58 Agric. Dec. 1011, 1018 (1999) (stating the Judicial Officer’s former policy, which is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 150 (1984) (stating the policy in future cases will be that if full payment is not made by the opening of the hearing, together with present compliance with payment provisions, the case will be treated as a “no-pay” case).

Recons. of Remand Order at 5-7.)

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transp., Inc.*, had been to allow the PACA licensee to avoid license revocation by paying in full and being in full compliance with the PACA by the date of the hearing. The "slow-pay"/"no-pay" policy in *Gilardi* is not limited by the time between a payment violation and the hearing. I reject Complainant's suggestion that I disregard the "slow-pay"/"no-pay" policy that was in effect at the time Complainant instituted this disciplinary proceeding and adopt a "slow-pay"/"glacial-pay"/"no-pay" policy for this proceeding.

Finally, Complainant states the United States Court of Appeals for the District of Columbia Circuit based its remand of this proceeding to the United States Department of Agriculture primarily upon a declaration made to the Court by Respondent's chief executive officer under penalty of perjury that full payment had been made to the produce sellers identified in the Complaint by January 13, 1999. Complainant contends this declaration is false. Complainant requests, based on Respondent's purportedly false declaration, that I modify the August 27, 2001, Remand Order to instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. (Request for Recons. of Remand Order at 7-8.)

I reject Complainant's request that I instruct the Chief ALJ that Respondent is estopped from presenting evidence of payments made to produce sellers after January 13, 1999. The United States Court of Appeals for the District of Columbia Circuit remanded the proceeding to the United States Department of Agriculture to determine whether this is a "no-pay" case, warranting revocation of Respondent's PACA license, or a "slow-pay" case, warranting suspension of Respondent's PACA licence. Critical to that determination are payments that Respondent has made or will make to the produce sellers identified in the Complaint by the date of the hearing. Prohibiting Respondent from introducing evidence of payments it made or will make between January 13, 1999, and the date the Chief ALJ holds the hearing, would not only deny Respondent due process, but would also contravene the Court's explicit reasons for remanding the case to the United States Department of Agriculture for further the proceedings. *Kirby Produce Co. v. United States Dep't of Agric.*

For the foregoing reasons and the reasons set forth in *In re Kirby Produce Co.*, 60 Agric. Dec. ____ (Aug. 27, 2001) (Remand Order), I deny Complainant's request for reconsideration of the August 27, 2001, Remand Order.
